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SERVICE DATE - LATE RELEASE OCTOBER 20, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34421

HOLRAIL LLC—CONSTRUCTION AND OPERATION EXEMPTION—
IN ORANGEBURG AND DORCHESTER COUNTIES, SC

STB Finance Docket No. 34421 (Sub-No. 1)

HOLRAIL LLC—
PETITION FOR CROSSING AUTHORITY UNDER 49 U.S.C. 10901(d)

Decided: October 20, 2004

By petition filed on November 13, 2003, HolRail, LLC (HolRail) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for authority to construct and operate approximately 2 miles of rail line in Orangeburg and Dorchester Counties, SC. The proposed new line would extend from a connection with the Norfolk Southern Railway Company (NSR) near Giant, SC, to a cement production facility called Holly Hill, owned by HolRail's parent company, Holcim (US) Inc. (Holcim). The stated purpose of the proposed construction is to provide competitive rail service to Holly Hill. By decision served on February 11, 2004, the Board instituted a proceeding to consider the request and the issues raised.

BACKGROUND

Holcim manufactures a variety of cement and masonry products at Holly Hill. CSX Transportation, Inc. (CSXT), currently the only rail carrier with direct access to Holly Hill, provides Holcim with rail service for both its outgoing products and its inbound raw materials. HolRail claims that CSXT's service has been unreliable and its rates excessive, thereby negatively affecting Holcim's business. In addition, HolRail states that CSXT is not equipped to meet Holcim's future shipping needs, which will soon increase due to Holly Hill's anticipated increased production. HolRail thus proposes to construct and operate a build-out approximately 2 miles long from Holly Hill to reach a connection with NSR.

HolRail proposes two potential routes for the build-out. HolRail's preferred route would run parallel to CSXT's track and at least partially within CSXT's right-of-way (ROW) for most of its length; it would connect with NSR's line on land owned by a neighboring cement factory. HolRail currently has no right to use CSXT's ROW, but it states that it intends, if it is necessary to do so, to file a petition with the Board for authority to cross CSXT's ROW pursuant to 49 U.S.C. 10901(d). HolRail further states that it intends to obtain an easement to use the property of the neighboring cement factory. HolRail's alternative route, like its preferred route, would run

parallel to CSXT's line, but it would be constructed approximately 50 yards outside CSXT's ROW, on land already owned by Holcim. According to HolRail, its preferred route would have fewer environmental impacts than its alternative route.

CSXT has filed a motion to dismiss HolRail's petition for exemption, to which HolRail has replied. CSXT has also filed a motion, to which HolRail has replied, to compel discovery concerning HolRail's construction plans and statements made by HolRail in its petition.

Finally, HolRail has filed two motions to compel, to which CSXT has replied. In its first motion, HolRail requests that we order CSXT to allow HolRail representatives to enter onto CSXT's ROW to collect information that it claims would be necessary to prepare a crossing petition. In its second motion, HolRail asks us to order CSXT to respond to HolRail's interrogatories and to produce documents detailing the condition of CSXT's line and documents about CSXT's freight operations over the line to the cement factory.

DISCUSSION AND CONCLUSIONS

This decision addresses three issues: (1) CSXT's motion to dismiss HolRail's petition for exemption to construct a rail line; (2) HolRail's request for a preliminary determination, subject to environmental review, that the rail line should be authorized; and (3) both parties' motions to compel discovery.

CSXT asks us to dismiss the proceeding on the ground that HolRail's proposal is insufficiently developed to warrant Board consideration, is necessarily predicated on an impermissible use of the crossing provision of our statute, and would physically interfere with operation of the CSXT line.

HolRail has provided a general level of information about its purpose and objectives for a new line — information such as its carload estimates, the reasons HolRail believes a new line is needed, and the general location of both its proposed route and its alternative route (including a map). HolRail has not yet provided any more details as to what the line would look like, but that is because it has not been able to collect all of the information necessary for it to devise a construction plan. Without such information, we cannot properly assess the arguments that CSXT advances against the proposal. Nor can the Board's Section of Environmental Analysis evaluate the environmental impacts, if any, until HolRail devises a construction plan and proposes an alignment. Due to this lack of a complete record, as well as the unique facts and issues presented in this case, it would be premature to dismiss the case at this time. Thus, CSXT's motion to dismiss is denied.

In its petition, HolRail asks us to make a preliminary determination, subject to later environmental review, that construction and operation of this rail line should be authorized. While we have in the past bifurcated the process authorizing the construction subject to later

environmental review, see, e.g., Pemiscot County Port Authority—Construction Exemption—Pemiscot County, MO, STB Finance Docket No. 34117 (STB served July 2, 2002, and Aug. 26, 2003), that would be inappropriate here. As set forth above, the proposal is not yet fully defined. Therefore, we will not decide the merits of HolRail’s proposal until a complete record is before us.

HolRail also requests, in two separate motions, that we compel CSXT to allow it to enter onto CSXT’s ROW to inspect it, and compel CSXT to answer interrogatories and provide documents regarding CSXT’s ROW, the condition of its line, and the particulars of its service. We will grant HolRail’s two motions to compel. HolRail needs this information to prepare its construction and operating plans, which the Board must take into account in deciding HolRail’s petition for exemption. Therefore, we direct CSXT to give HolRail reasonable access to its facility (we expect CSXT and HolRail to schedule site visits within 20 days of the service date of this decision), and to respond to HolRail’s interrogatories and document requests, so that HolRail can further develop its proposal.

So that CSXT has the opportunity to present its case, we will grant those parts of CSXT’s motion to compel that ask HolRail to produce more detailed information regarding its proposal. We recognize that HolRail does not have all of the sought information at this time, but it shall provide the information as it becomes available. Notwithstanding HolRail’s objections, budget information may be material for CSXT to assess whether HolRail’s construction plans would in fact be feasible. We also find HolRail’s carload projections to be relevant. HolRail argues that current and future carload data will only be relevant once HolRail files its petition for crossing. However, HolRail’s entire case — indeed, even the details of how its construction proposal will look — is inextricably bound up with the crossing issue. Therefore, we will not approach this case in a piecemeal fashion, and we will not rule on the exemption petition until all components of HolRail’s proposal, including the anticipated crossing petition, are before us. Under the circumstances, information such as the carload data is relevant now. HolRail is thus directed to respond to CSXT’s Interrogatory Nos. 2, 4-6, 9-11, 13, and 15-17; Document Request Nos. 1-6, and 8-9; and Request for Admissions Nos. 1-12, all of which pertain to HolRail’s construction and budgetary plans and carload projections for rail service over its proposed line.

The remainder of CSXT’s motion will be denied. The information that CSXT seeks on HolRail’s allegations regarding CSXT’s level of service is not essential at this point in the proceeding because “inadequacy of existing service is not a necessary showing under the statutory criteria for the licensing of new lines.”¹ Should the information become relevant as the case develops, CSXT may seek discovery at an appropriate time.

¹ See Midwest Generation, LLC—Exemption from 49 U.S.C. 10901—for Construction in Will County, IL, et al., STB Finance Docket No. 34060, slip op. at 4 (STB served Mar. 21, 2002).

Finally, if either party believes that any of the documents or information that we have directed to be turned over contains trade secrets or confidential commercial information, it may petition the Board for a protective order.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. CSXT's motion to dismiss is denied as premature.
2. HolRail's first motion to compel discovery is granted.
3. HolRail's second motion to compel discovery is granted.
4. CSXT's motion to compel discovery is granted as to Interrogatory Nos. 2, 4-6, 9-11, 13, and 15-17; Document Request Nos. 1-6, and 8-9; and Request for Admissions Nos. 1-12. CSXT's motion to compel is denied as to all remaining discovery requests.
5. This decision is effective 10 days from its service date.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary

COMMISSIONER BUTTREY, commenting:

In considering a motion to dismiss, we are to construe the pleadings in the light most favorable to the non-moving party. Here, HolRail has not yet attempted to make its case. Indeed, its proposal is not yet fully formed. Therefore, in the interest of due process, I join with my colleagues in treating the motion to dismiss as premature.

Nevertheless, I feel compelled to express concern about HolRail's proposal. HolRail presents its case as a fairly routine construction case that will likely include a crossing request under 49 U.S.C. 10901(d) at some later stage. Looking behind HolRail's filings, however, it is clear to me that this case is anything but routine. As a practical matter, it appears that the only way HolRail could build its preferred route is by "taking" CSXT's right-of-way for essentially the entire line that it wants to construct. While HolRail may wish to characterize that construction as a crossing, that interpretation appears to be a rather extraordinary concept. HolRail will have a heavy burden to convince me that this is a proper use of the construction and crossing provisions of the statute. Instead, HolRail's proposal appears to be tantamount to a confiscation that is beyond anything contemplated by section 10901.